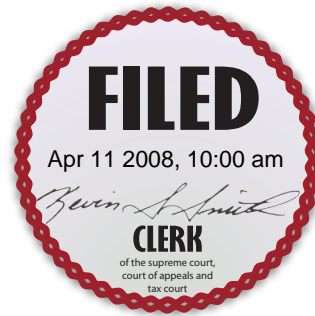


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICK LEE ENIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0709-CR-817

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No.48C01-0701-FD-42

April 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Rick Lee Enis was convicted of strangulation, a Class D felony, domestic battery, a Class B misdemeanor,¹ and interference with the reporting of a crime, a Class A misdemeanor. Enis appeals his conviction of strangulation, arguing that Indiana's strangulation statute is unconstitutionally vague. Enis also appeals his aggregate sentence of four years, with two years suspended, arguing that the trial court abused its discretion by finding an improper aggravating circumstance and that the sentence is inappropriate given the nature of the offenses and his character. Concluding that the strangulation statute is constitutional, we affirm Enis's conviction for strangulation. However, concluding the trial court abused its discretion in sentencing Enis, we reverse his sentence and remand with instructions that the trial court issue a new sentencing statement.

Facts and Procedural History

Enis and A.W. had a five-year-old child and had been in a cohabitant relationship for roughly eight years when the two got into an argument and A.W. ended the relationship in January 2007. The following Wednesday, January 23, 2007, A.W. was talking on the phone and Enis began inquiring into the subject of her conversation. When Enis became so loud

¹ The abstract of judgment and chronological case summary indicate that Enis was convicted of domestic battery as a Class B misdemeanor. However, domestic battery cannot be classified as a Class B misdemeanor. See Ind. Code § 35-42-2-1.3. At the bench trial, the trial court stated, "Clearly I think he's guilty of Battery, but I'm not sure that the state proved that there was bodily injury." Transcript at 76. We believe it clear that the trial court intended to find Enis guilty not of domestic battery, but of the lesser included offense of battery as a Class B misdemeanor. Cf. Ind. Code § 35-42-2-1 (indicating that bodily injury is not an element of battery as a Class B misdemeanor); Hand v. State, 863 N.E.2d 386, 389 n.3 (Ind. Ct. App. 2007) (recognizing that battery is factually a lesser included offense of domestic battery). Therefore, on remand, we instruct the trial court to correct the abstract of judgment to make it clear that Enis was convicted of battery, and not domestic battery.

that A.W. could not hear the person with whom she was speaking, A.W. hung up the phone and attempted to go out to her car to finish the conversation. At this point, Enis physically restrained A.W. and told her that she was not leaving until she had sex with him. After Enis pushed A.W., she attempted to call the police, but Enis grabbed her phone. When A.W. began to scream, Enis put his hand over A.W.'s nose and mouth, rendering A.W. unable to breathe. After A.W. indicated that she would go into the bedroom with Enis, he slapped her across the face.

After Enis let A.W. up, she tried to leave the house, but Enis grabbed her and put her in a headlock, again rendering A.W. unable to breathe. A.W. then indicated that she would go into the bedroom, did so, and undressed. Shortly thereafter, Enis abandoned his efforts to have sex with A.W., told her to dress, gave her the phone, and told her to call the police.

On January 24, 2007, the State charged Enis with strangulation, a Class D felony, domestic battery, a Class A misdemeanor, and interference with the reporting of a crime, a Class A misdemeanor. Enis waived his right to a jury trial, and the trial court held a bench trial on April 17, 2007. At this trial, A.W. testified to the facts as stated above. Following the State's introduction of evidence, Enis moved to dismiss the strangulation charge based on insufficient evidence and because the statute was unconstitutionally vague. The trial court denied this motion. Enis then testified, admitting to taking the phone from A.W., but denying that he choked or slapped her.

The trial court found Enis guilty of strangulation, domestic battery as a Class B misdemeanor, and interference with the reporting of a crime. On May 7, 2007, the trial court

held a sentencing hearing and sentenced Enis to three years for strangulation, with one year suspended; one year for interference with the reporting of a crime, all suspended but to be served consecutively; and sixty days for domestic battery, to be served concurrently. Enis now appeals his conviction of strangulation and his sentence.

Discussion and Decision

I. Constitutional Challenge To Strangulation Statue

Under Indiana Code section 35-42-2-9,

(b) A person who, in a rude, angry, or insolent manner, knowingly or intentionally:

(1) applies pressure to the throat or neck of another person; or

(2) obstructs the nose or mouth of the [sic] another person;

in a manner that impedes the normal breathing or the blood circulation of the other person commits strangulation, a Class D felony.

A presumption exists that a statute is constitutional, and the party challenging the statute bears the burden of proving it unconstitutional. Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007). We will resolve any reasonable doubt in favor of the statute's constitutionality. W.C.B. v. State, 855 N.E.2d 1057, 1060 (Ind. Ct. App. 2006), trans. denied. In accordance with due process, "a penal statute is void for vagueness if it does not clearly define its prohibitions." Brown, 868 N.E.2d at 467. Two reasons exist for which we will hold a statute unconstitutionally vague: "(1) for failing to provide notice enabling ordinary people to understand the conduct it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement." Id. (citing City of Chicago v. Morales, 527 U.S. 41, 56 (1999)). Therefore, a statute must "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding." Rhinehardt v. State, 477

N.E.2d 89, 93 (Ind. 1985), overruled on other grounds, Stout v. State, 528 N.E.2d 476 (Ind. 1988). We will not conclude a statute is void for vagueness “if individuals of ordinary intelligence could comprehend it to the extent that it would fairly inform them of the generally proscribed conduct.” Klein v. State, 698 N.E.2d 296, 299 (Ind. 1998). “The specificity that due process requires may be ascertained by reference to the entire text of the statute, to well-settled common law meanings, to prior judicial decisions, to similar statutes, or to common generally accepted usage.” Bozarth v. State, 520 N.E.2d 460, 463 (Ind. Ct. App. 1988), trans. denied. In determining whether a statute is unconstitutionally vague, we are mindful that “[n]o statute need avoid all vagueness, and ‘because statutes are condemned to the use of words, there will always be uncertainties for we cannot expect mathematical certainty from our language.’” Logan v. State, 836 N.E.2d 467, 473 (Ind. Ct. App. 2005) (quoting Helton v. State, 624 N.E.2d 499, 507 (Ind. Ct. App. 1993), trans. denied, cert. denied, 520 U.S. 1119 (1997)), trans. denied.

Enis makes the following argument with regard to the strangulation statute’s vagueness:

How long does breathing or blood circulation have to be impeded? Does a simple punch to the nose or jaw that momentary [sic] closes the nose or mouth by the impact qualify? Does a slap to the face that causes the nose bleed qualify? When does misdemeanor battery which involves a fist fight with blows to the jaw and nose become the felony offense of strangulation?

Appellant’s Brief at 7.

First, we note that in this case, Enis did not merely punch or slap A.W., but “covered [A.W.’s] mouth and [her] nose with his hand to where [she] could not breathe.” Tr. at 20. It

is well established that “a statute is void for vagueness only if it is vague as applied to the precise circumstances of the instant case.” Manigault v. State, 881 N.E.2d 679, 687 (Ind. Ct. App. 2008) (quoting W.C.B., 855 N.E.2d at 1062). Therefore, we examine a statute for vagueness “in light of the facts and circumstances of each individual case.” Brown, 868 N.E.2d at 467. In this case, there is no doubt that a person of ordinary intelligence would understand that covering another’s mouth rendering that person unable to breathe is conduct proscribed by the strangulation statute. Cf. State v. Lombardo, 738 N.E.2d 653, 656 (Ind. 2000) (concluding that “a person of ordinary intelligence would know, under any reasonable interpretation, that the act of wiring a tape recorder under a house to record secretly another’s conversation is an ‘intentional’ act clearly prohibited by the Act’s current statutory scheme [prohibiting one from intercepting a telephonic or telegraphic communication without consent].”).

In regard to Enis’s complaint that the statute does not define an amount of time for which breathing or circulation must be impeded, we do not find it necessary for the statute to establish a time limit. Cf. Glover v. State, 760 N.E.2d 1120, 1123 (Ind. Ct. App. 2002) (“The statute need only inform the individual of the generally proscribed conduct; it need not list with exactitude each item of conduct prohibited.”), trans. denied.

Again, it is clear that a person of ordinary intelligence would realize that the statute proscribes Enis’s conduct. We conclude that Indiana’s strangulation statute is not unconstitutional based on the facts of this case.

II. Propriety of Enis’s Sentence

At the sentencing hearing, the trial court made the following statement regarding sentencing:

Okay. Now there's lots of things you can do with a pretty girl and . . . but strangling her is not one of them. That's not something you're suppose to do. There is no justification or excuse, no anger justifies strangling the mother of your child. That's just not done. There's some things you don't do. You don't take the mask off the lone ranger and you don't strangle anyone. You don't strangle her. There's lots of things you do with a gal, but not strangle her. We're just not gonna do that. It's not right and you know it's not right. Now you've said a different story in your pre-sentence that she caused you some injury but you didn't tell me that when we had the trial and I think that's a little bit different, but I'm not gonna quarrel with you on that.

I'm just saying that's not something gentlemen . . . are suppose to do. You don't strangle a lady. Now come on. You're a big man. You can pick up a pickup truck and move the thing. You know, there's no reason for you to hurt this girl.

You can't get along, fine. Don't get along.

But you've poisoned the well now for this little boy. If this is your son you probably care a lot for him.

It's only natural.

But you can't go around strangling the boy's mother. You know better than that don't you?

Tr. at 98-99.

A trial court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). However, a trial court is required to issue a sentencing statement when sentencing a defendant for a felony, as this statement is “an integral part of the trial court’s sentencing procedure.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. This statement must include “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. at 491.

A primary purpose of a sentencing statement is to ““help both the defendant and the

public understand why a particular sentence was imposed.’” Id. at 489 (quoting Abercrombie v. State, 275 Ind. 407, 417 N.E.2d 316, 319 (1981)). In order to facilitate appellate review of a trial court’s sentencing decision, its statement must include ““a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions.’” Id. at 490 (quoting Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981)). Here, the trial court’s sentencing statement² fails to identify such specific reasons for imposing its particular sentence. Although the trial court mentioned that the victim was the mother of Enis’s child, we do not believe that this passing reference is sufficient to render the sentencing statement adequate. We also reject the State’s contention that the trial court “clearly based the imposition of the three year sentence for the strangulation conviction upon [Enis’s] recent and lengthy criminal history.” Appellee’s Brief at 10. Although the State argued that the trial court should consider Enis’s criminal history in imposing a sentence above the advisory, the trial court never mentioned such criminal history in its sentencing statement. Moreover, the significance of a defendant’s criminal history is dependant on a number of circumstances, see Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006), and we

² We note that the trial court did not enter a written sentencing statement. The state of the law prior to Anglemyer was that a trial court was not required to enter a written sentencing statement so long as such statement appeared in the transcript of the sentencing hearing. See Coates v. State, 534 N.E.2d 1087, 1098 (Ind. 1989) (“If otherwise adequate and complete, the sentencing statement need not be set out in a separate order book entry except in death penalty cases, but may be provided in the transcript of the sentencing hearing.”); see also Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002) (“[W]e are not limited to the written sentencing statement but may consider the trial court’s comments in the transcript of the sentencing proceedings.”). Nothing in Anglemyer indicates that a separate written sentencing statement is now required. However, we note that the better practice may still be to issue a written sentencing statement identifying the reasons for a particular sentence. See Mundt v. State, 612 N.E.2d 566, 568 (Ind. Ct. App. 1993) (“While better practice would be for the trial court to set out a written statement of its reasons in its sentencing order, it

will not presume that the trial court found Enis's criminal history significant enough to impose the maximum sentence for strangulation.

In some cases, when the trial court has issued an insufficient sentencing statement, it may be prudent to analyze the sentence under Indiana Appellate Rule 7(B). See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007). However, in other circumstances, we have concluded that the better option is to remand and allow the trial court to exercise its discretion by issuing a new sentencing statement, indicating the specific reasons for imposing its sentence. See Smith v. State, 872 N.E.2d 169, 179 (Ind. Ct. App. 2007) (remanding with instructions that the trial court enter a sufficiently detailed sentencing statement), trans. denied; Ramos v. State, 869 N.E.2d 1262, 1264 (Ind. Ct. App. 2007) (noting that the trial court's sentencing statement did not facilitate meaningful appellate review and remanding for a sentencing statement including "'reasonably detailed reasons or circumstances for imposing' the sentence that it did" (quoting Anglemyer, 868 N.E.2d at 491)). We conclude that in this case, the better option is to remand, and we do so with instructions that the trial court issue a new sentencing statement, which must include the specific reasons for imposing the particular sentence.³

Conclusion

We conclude that Indiana's strangulation statute is not unconstitutionally vague as applied to this case and affirm Enis's conviction. However, we conclude the trial court

is sufficient, in non-death penalty cases, if the trial court's reasons for enhancement are clear from a review of the sentencing transcript."), trans. denied.

abused its discretion in sentencing Enis and remand and instruct the trial court to issue a new sentencing statement. We also instruct the trial court to correct the abstract of judgment to indicate that Enis was convicted of battery, and not domestic battery.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.

³ On remand, the trial court need not hold a new sentencing hearing. Also, the trial court is not required to issue the same sentence as it did initially.